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In the Supreme Court of the United States

OCTOBER TERM, 1956

FEDERAL TRADE COMMISSION, PETITIONER

v.

STANDARD OIL COMPANY

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

J. LEE RANKIN,
Solicitor General,
VICTOR R. HANSEN,
Assistant Attorney General,
Department of Justice, Washington 25, D. C.

EARL W. KINTNER,
General Counsel,
ROBERT B. DAWKINS,
Assistant General Counsel,
Federal Trade Commission,
Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 465

FEDERAL TRADE COMMISSION, PETITIONER

v.

STANDARD OIL COMPANY

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Notwithstanding the Government's usual reluctance to file reply briefs in support of petitions for certiorari, we feel obliged to do so in the instant case because of a number of inaccurate and misleading statements appearing in Standard's brief in opposition. Three such statements, each of which the Government believes to be demonstrably without foundation, are particularly deserving of answer: (1) that the issue presented by the petition is "hypothetical" and "was not adjudicated below" (Br. Opp. 6); (2) that review of the decision below would require this Court "to plow through a voluminous record" and make "a *de novo* appraisal" of the evidence (Br. Opp. 7–8); (3) that the Department of Justice "at first publicly accepted the ruling below as a sound statement of law" but "For reasons that are not apparent, there has now been a change of mind" (Br. Opp. 5–6, 13).

1. The basic issue presented by the Government's petition is whether regular and systematic price discrimination, otherwise plainly unlawful under the Robinson-Patman Act, can be justified under Section 2 (b) (as a "good faith" meeting of competition) on the ground that the seller's competitors employ the same pricing policy. Stated otherwise, the issue is whether such a pricing policy falls within the scope of the doctrine of the *Staley* and *Cement* cases (*Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U. S. 746, 753; *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, 725), which ruled that Section 2 (b) "does not concern itself with pricing systems," does not permit a seller "to use a sales system which constantly results in his getting more money for like goods from some customers than he does from others," and relates only to "individual competitive situations."

Standard does not seriously contend that this issue is not one of general importance warranting review by this Court. Rather, it argues that the issue is "hypothetical" and "was not adjudicated below" (Br. Opp. 6). This assertion, we submit, can not be supported. The issue which Standard terms "hypothetical" was the principal issue before the Commission in the proceedings after remand from this Court. And it was the principal issue before the court below. In these circumstances, it is surely not surprising to find that the court did in fact pass on the issue, as reference to the court's opinion will readily confirm. Indeed, the court was quite explicit as to what it conceived to be the scope of the *Staley-Cement* doctrine. The court,

after setting forth the Commission's contention, stated (Pet. 25):

> * * * The basing point system under scrutiny in those cases was labeled by the Supreme Court as unlawful and was employed by many and in some instances all members of the same industry. The system involved freight absorption and the collection of phantom freight. The system was utilized to stabilize or increase but never to lower prices. The system as pointed out in the *Cement* case eliminated all price competition and resulted in the sale of the product by all dealers at any given point at identical prices and terms. The gist of the reasoning of the Supreme Court in those cases was that the pricing system being illegal all prices determined thereby were illegal. It follows, according to such reasoning, that the meeting by the seller of a competitor's unlawful price precludes the seller from reliance upon a "good faith" defense.

Given this restrictive interpretation of *Staley* and *Cement*, the Commission's contention was necessarily rejected since "The system described and condemned in *Corn Products*, later in *Staley*, and still later in *Cement*, bears not the slightest resemblance to the pricing system which the Commission purports to detect in the instant situation" (Pet. 25). The court added that "in the instant situation there is no finding, no contention and not even a suspicion but that the competing prices which [Standard] met were lawful" (Pet. 26).

Thus the opinion below (although the last-quoted statement is of dubious accuracy)[1] presents the issue squarely. It is the Government's position that the court below erred in holding (*supra*) that "The gist of the reasoning of the Supreme Court in [the *Staley* and *Cement*] cases was that the pricing system being illegal all prices determined thereby were illegal." In the Government's view, the *Staley-Cement* doctrine is not limited to cases involving basing-point systems and does not merely stand for the proposition (*supra*) "that the meeting by the seller of a competitor's unlawful price precludes the seller from reliance upon a 'good faith' defense." In short, it is the Government's position that the *Staley* and *Cement* decisions mean what they say—namely, that Section 2 (b) "does not concern itself with pricing systems," does not permit a seller "to use a sales system which constantly results in his getting more money for like goods from some customers than he does from others,"

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[1] It is true that in this proceeding the Commission did not adjudicate the legality of the competing prices which Standard allegedly met. In the Commission's view, such a finding is not required under the *Staley-Cement* doctrine. See text, *supra*. But the Commission has issued similar complaints against Gulf, Texas, and Shell. In addition, Standard has insisted that its pricing policies—which the Commission did find to be unlawful—were identical to those of its competitors, and in fact based its Section 2 (b) defense on that ground. In these circumstances, it cannot be said that there is "no contention and not even a suspicion but that the competing prices which [Standard] met were lawful." Moreover, the court's statement implies that the burden was on the Commission to establish the unlawfulness of such prices. Under the Act, the burden of making out a defense under Section 2 (b) is upon the party charged with violation.

and relates only to "individual competitive situations." 324 U. S. at 753; 333 U. S. at 725.

2. Standard also is in error in asserting that review of the decision below would require this Court "to plow through a voluminous record" and make a "*de novo* appraisal" of the evidence (Br. Opp. 7, 8).

At the outset, it should be noted that the court below took quite a different view of the appellate function in this case. The court stated (Pet. 20–21):

> * * * Certainly there is no dispute as to the evidentiary facts as found by the Examiner in the original proceeding. Referring thereto, the Commission in its brief states, "Here the facts as such are not in dispute, it is simply a matter of applying the law to the facts." Moreover, the Commission's decision on the "good faith" issue is the result of its process of reasoning, legal in nature, * * *. Such being the case, the weight to be attached to its decision is dependent upon the reasoning by which it is reached.

The court might also have referred to the following statement in Standard's brief below (p. 6): "The controlling facts are not in dispute. The trial examiner's report * * * sets out the facts essential to a resolution of this case." We are unaware of any reason why this case—which the court below and both parties agreed was a "law" case—should now become a "fact" case on reaching the Supreme Court.[2]

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[2] Standard contends that the court below decided—as an issue of fact—that Standard had no such pricing system (Br. Opp. 6-8). "But 'issue of fact' is a coat of many colors. It

Actually, the pertinent facts are not only undisputed but are, for the most part, set forth in Standard's own answer to the complaint in this proceeding. In Paragraphs 16 and 17 (reproduced in the Appendix, *infra*, pp. 12–15), Standard frankly stated: that it had a "general policy and practice of bona fidely selecting and classifying gasoline customers as wholesale or jobber customers, as distinguished from retail resellers"; that so-called "jobber" accounts must meet certain qualifications (*e. g.*, a certain annual volume); that "jobber" accounts, "as a result of such necessary selection and classification of customers, and as an integral and basically essential part thereof", regularly received the lower "tank-car" price; and "that such system and practice of selection and classification of customers" was a common one in the oil industry. Standard's 1950 brief in this Court,[3] as well as the testimony of its own witnesses before the Commission, are to like effect. At this juncture in the

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does not cover a conclusion drawn from uncontroverted happenings, when that conclusion incorporates standards of conduct or criteria for judgment * * *". *Watts* v. *Indiana*, 338 U. S. 49, 51 (per Frankfurter, J.). Particularly is this so in the instant case where (1) the court's conclusions relied upon by Standard as being "factual" are basically inconsistent with Standard's express admissions (see note 6, *infra*) and (2) the court itself did not regard the issue before it as evidentiary (see text, *supra*, p. 5).

[2] In many respects, Standard's dual-price formula bears a striking similarity to the practice condemned in *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37. See also *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470, 475.

[3] See Brief for Petitioner, *Standard Oil Co.* v. *Federal Trade Commission*, No. 1, 1950 Term, pp. 3, 4, 43, 46.

[4] See petition for certiorari (note 7) in the instant case.

proceeding, Standard can scarcely be permitted to withdraw or disavow these admissions. And Standard can have no real objection to the Commission's reliance on these admissions. Thus, the fundamental issue presented by the Government's petition for certiorari is simply whether a pricing "system and practice" of the type admitted by Standard falls within the scope of the *Staley-Cement* doctrine. The resolution of this issue certainly does not require this Court "to plow through a voluminous record" (Br. Opp. 7) or to make "a *de novo* appraisal" of the evidence (Br. Opp. 8). Instead, as already pointed out, it requires only the drawing of certain inferences—essentially legal in nature—from the undisputed facts.[1]

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[1] See note 2, *supra*. Nor is any broader scope of review required by the assertion of the court below that Standard "sold invariably at its uniform tank-wagon price, except when at different times it reduced the price to meet competitive offers in order to retain a customer." This assertion, if it is intended to suggest that Standard did not maintain a dual price "system and practice" and did not *regularly* sell to its "jobber" customers at the lower "tank-car" price, is directly contradicted by Standard's admissions (see, *e. g.*, Appendix, *infra*, pp. 12–15).

Standard also relies (Br. Opp. 6–7) on the court's statement that "The bargaining and haggling which took place between [Standard] and the four involved 'wholesalers' prior to a reduction in prices to them is hardly consistent with the Commission's theory that prices were reduced pursuant to a system" (Pet. 26). As pointed out in the petition for certiorari (Pet. 15, n. 9), the quoted statement distorts "the Commission's theory" and ignores the fact that any evidence of "bargaining and haggling" relates to a period *prior* to the customers' compliance with Standard's "jobber" requirements. In this connection, it may be noted that the court below acknowledges

3. Also without basis is Standard's assertion that "The Government [*i. e.*, the Department of Justice] at first publicly accepted the ruling below as a sound statement of law in accord with this Court's 1951 decision" and that "For reasons that are not apparent, there has now been a change of mind" (Br. Opp. 5-6, 13). Contrary to this assertion, the Department of Justice, prior to petitioning for certiorari, took no position whatever on the correctness of the decision below.[7]

Standard's policy of refusing to grant its "tank-car" price to any customer who fails to comply with these requirements (Pet. 27).

[7] Equally misleading is Standard's description of the Commission's decision. According to Standard (Br. Opp. 2):

"'Good faith' was denied due to (1) respondent's alleged knowledge that its prices would cause competitive 'injury'; (2) its inability to 'cost-justify' these prices; (3) the pricing 'policy' or 'method' pursuant to which it allegedly made the challenged reductions to its four 'jobber' customers in Detroit."

First of all, it was never the Commission's position that Standard made any "reductions" pursuant to a system; the exact converse is true (see petition for certiorari, note 9).

Secondly, what Standard labels "the first two grounds of the FTC ruling" (Br. Opp. 2) are but parts of a single ground which, in the Commission's decision, was ancillary to its *Staley-Cement* ground. See petition for certiorari, p. 7. With respect to this ancillary ground, the Commission found an absence of "good faith" because of Standard's failure to re-examine its pricing system after passage of the Robinson-Patman Act. In this connection, the Commission found that Standard *knew* its pricing system was not cost-justified and was inflicting competitive injury. For the treatment of this ancillary ground by the court below, see petition for certiorari, note 3. This matter was "relegated to a footnote" (Br. Opp. 2), not because it has been abandoned, but because of the relatively greater importance of the *Staley-Cement* issue.

Standard (Br. Opp. 13) relies wholly on a letter dated June 27, 1956, from Warren Olney III, Acting Deputy Attorney General, to the Chairman of the Senate Judiciary Committee. The letter is reprinted in *Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee on Bills to Amend Section 2 of the Clayton Act*, 84th Cong., 2d Sess., pp. 688–689. As the letter makes abundantly clear, its purpose was only to advise the Committee that the decision below (and *Balian Ice Cream Co.* v. *Arden Farms Co.*, 231 F. 2d 356 (C. A. 9), certiorari denied, 350 U. S. 991) did not cause the Department to withdraw its long-standing opposition to proposed legislation (then under study by the Committee) which would overrule this Court's decision in *Standard Oil Co.* v. *Federal Trade Commission*, 340 U. S. 231, holding that Section 2 (b) provides a complete defense to charges of price discrimination. The letter states in pertinent part:

> We have carefully analyzed the decisions in these two cases and do not feel that these holdings indicate a need for the proposed legislation.
>
> * * * * *
>
> It is our position that neither of the above cases furnishes sufficient basis for the Department to change its position of opposition to the so-called equality-of-opportunity legislation. They do *not broaden the scope or adversely affect what we consider to be the merits of a Section 2 (b) defense.* [Emphasis added.]

The italicized language, out of its context, is quoted by Standard to show that the Department "accepted the

ruling below as a sound statement of law in accord with this Court's 1951 decision."

It is quite true, as the letter points out, that the decision below is "in accord with this Court's 1951 decision".[7] The two cases simply involve two different issues. If Standard meets the requirements of a "good faith" defense, the defense is of course a complete one under this Court's 1951 decision. But the issue here is whether Standard has met those requirements.

On this issue, the Commission and the Department of Justice are, and have been, in full accord.[8] Mr. Ohley's letter, we believe, is not fairly subject to an inference that the Department of Justice has "accepted the decision below as a sound statement of law * * *." In its context, and in the light of the letter's purpose, the italicized language (*supra*) does no more than reflect the Department's view that this Court's 1951 decision, irrespective of anything in the decision below, should continue to be controlling as to the scope of a Section 2(b) defense.[9] For the reasons already stated, there plainly is no inconsistency between opposing a bill which would overrule this Court's 1951 decision and urging that the

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[7] See also petition for certiorari, p. 8.

[8] See petition for certiorari, p. 8, n. 2.

[9] Similarly, Standard's (Br. Opp. 13) other quotation from the letter ("pricing differences may, we emphasize, be justified under existing law only in response to individual competitive situations and may not be extended beyond what is necessary to meet good faith offers of competitors") merely states the Department's understanding of the *Staley* and *Cement* decisions.

court below misapplied this Court's *Staley* and *Conant* decisions."

CONCLUSION

In the petition for certiorari (Pet. 16), it is pointed out that this case is of general importance, not only because of the ruling made by the court below in this proceeding against Standard, but also because of the direct impact of that ruling in proceedings against Standard's major competitors—Gulf, Texas, and Shell—against whom similar complaints are now pending. Standard's "meeting competition" defense is based squarely on a Commission finding (which in turn is based on Standard's own admissions) that major competitors use the same dual price formula as Standard (R. 5388). If Standard, on this basis, can defend its regular grant of a "tankcar" price to its "jobber" customers, it would seem to follow necessarily that Standard's competitors can defend their use of the same dual price formula, on the ground that they were merely meeting Standard's "equally low price." As stated in the petition (Pet. 16): "In other words, as long as competing sellers follow the same discriminatory price policies, each is protected." This result is dismissed by Standard, without supporting reasons, as "wholly conjectural" (Br. Opp. 12, n. 13). We cannot agree. The problem, it is

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[1] It should also be noted that Mr. Olney's letter refers only to analysis of "the decisions in these two cases". The serious nature of the decision below can be understood only in relation to Standard's admissions, which for the most part were ignored in the decision itself.

respectfully submitted, is a very real one which warrants review by this Court.

J. LEE RANKIN,
Solicitor General.

VICTOR R. HANSEN,
Assistant Attorney General.

EARL W. KINTNER,
General Counsel,
ROBERT B. DAWKINS,
Assistant General Counsel,
Federal Trade Commission.

DECEMBER, 1956.

APPENDIX

Paragraphs 16 and 17 of Standard's answer (R. 12–15) state:

> Respondent alleges that since the time each of the gasoline customers named in Paragraph Three of the Complaint acquired its own bulk storage, distribution equipment and wholesale facilities, that such customer is entitled to be classified as a wholesale or jobber buyer of gasoline as distinguished from a retail reseller or service station operator who purchases gasoline on an entirely different basis of taking frequent small deliveries by tank truck from a supplier who delivers into relatively small storage tanks in or upon the service station premises, which tanks are directly connected to the retail pumps. Further, that such wholesaler or jobber buyers perform a distinctly different service and function and operate upon a different basis from retail sellers, and that such differences and distinctions in services and functions and between methods of operation have been recognized for many decades last past and are presently recognized and have been so recognized since June 19, 1936 in Detroit and elsewhere throughout the entire United States by the entire oil industry as well as by other industries dealing in substantially all kinds of consumer goods, and that in consequence of such differences and distinctions in operations, functions and services, and the essential recognition thereof, the oil industry and other industries in Detroit and throughout the rest of the United States has and does classify and bona fidely select customers on the basis of functional services and of methods of opera-

tions entitling customers to be classified in distinctive and distinguishable classifications. Further, that such classifications are essential and necessary and appropriate to the existing and continuing business and commercial activity in consumer commodities, including oil products, in Detroit and throughout the United States, and that such system and practice of selection and classification of customers in the oil industry and other industries in Detroit and throughout the United States forms a necessary, indispensable and integral part of the commercial economy of this nation, and one which must be considered, recognized, met, and participated in by an operator engaged in the business of distribution and marketing of oil products if such business is to fairly and successfully survive in the market place in Detroit or elsewhere in the United States. Further, that as a result of such necessary selection and classification of customers, and as an integral and basically essential part thereof, and of the system of commercial economy which makes such classifications necessary, differences in prices of the same commodities are made to customers selected and falling within different classifications, and purchasers falling within the classification of wholesalers or jobbers of gasoline are entitled to purchase at tank car prices as distinguished from dealer tank wagon prices at which gasoline is sold to retail resellers.

17.

Respondent alleges that its general policy and practice of bona fidely selecting and classifying gasoline customers as wholesale or jobber customers, as distinguished from retail resellers, is as follows:

That such wholesale or jobber customer so classified shall have adequate bulk storage of his own; that he be equipped to receive bulk

deliveries by tank car or truck train into such storage; that he have adequate distribution and delivery facilities; that he make tank car purchases in substantial volume and do a continuing substantial volume of business as a bona fide gasoline dealer maintaining and operating an established gasoline business; that he have satisfactory credit rating; that he maintain a sufficient personnel and all requisite facilities and equipment to adequately operate his business, service his customers, and perform his functions as a wholesaler or jobber, and assume the hazard and expense of fully operating his own business.

Respondent alleges that each of the four customers named in Paragraph Three of the Complaint fully, fairly, and reasonably falls within not only the requirements set forth in Paragraph 17 above but within all fair, reasonable, usual and proper requirements for classification as a wholesaler or jobber; and that each maintains its own adequate bulk storage, delivery tank trucks, salesmen and operating personnel; buys in substantial tank car or truck train lots; buys commodities other than gasoline in wholesale and carload lots; bears all expense of its own operations, no part of which are borne by Respondent; becomes immediately the absolute owner of the gasoline delivered into its storage by Respondent and controls its disposition; does not depend upon or desire that its customers be serviced by Respondent's salesmen, and Respondent's salesmen do not service or solicit such customers; assumes the risk of carrying its own inventories and of extending its own credits and making collections, and assumes all the hazards of its own operations. Further, that said four customers are each bona fidely qualified to be regarded and are regarded by the oil industry in Detroit as within the classification of wholesale or jobber customers, and they each are able to purchase as such from a

great number of gasoline suppliers operating in Detroit competitively with Respondent. Further, that Respondent is without power to, and is neither entitled nor required to police, control or dictate the manner or method of disposition of such gasoline as may be employed by such customers, and that such gasoline becomes the absolute property of such customers upon their purchase thereof from Respondent. Further, that said four customers and each of them are legitimately and lawfully entitled to purchase gasoline, and Respondent is entitled to sell them gasoline, within their classification as wholesalers or jobbers and at prices which are or may be at the time different and lower than prices charged by Respondent for the same product to Respondent's retail reseller customers without regard to any other consideration and without regard to any relation which such price differential may or may not bear to Respondent's differing operating costs arising from differing costs of manufacture, differing costs arising out of different methods of sale or delivery, or otherwise, and that any such acts upon Respondent's part and the existence of any such facts have not and do not constitute a violation of the meaning and terms of Section 2 (A) of the Clayton Act as amended and are not unlawful thereunder or under any law.